Supreme Court, U.S.
FILED

09-854 JAN 15 2010

OFFICE OF THE CLERK

No. 09-

In the Supreme Court of the United States

FORTIS INSURANCE COMPANY,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The jury in this insurance bad-faith case awarded respondent $150,000 in compensatory damages and $15 million in punitive damages. The South Carolina Supreme Court reduced the latter figure to $10 million, reasoning that such an amount was a constitutionally permissible single-digit multiple of the $1,081,189.40 in "potential harm" that respondent could have suffered. Although respondent had introduced evidence that, over a lifetime, a person with HIV could incur $1,081,189.40 in medical expenses in order to prove that petitioner had a "motive" to rescind his policy, respondent had never contended that this figure (which did not account for deductibles, co-pays, premiums, and exclusions) represented his potential harm, and in fact had never asked the jury to base punitive damages on potential harm at all (instead urging a wealth-based measure). Moreover, the trial court did not instruct the jury that it could consider potential harm, instead instructing that the punitive damages were required to bear a relationship to "the harm caused." The questions presented are:

1. Whether the South Carolina Supreme Court deprived petitioner of procedural due process by justifying the punitive damages on the basis of a ground that was not advanced by respondent at trial and that was foreclosed by the jury instructions.

2. Whether the $10 million punitive award—which is 67 times the compensatory damages, over nine times the measure of potential harm adopted by the court below, and $9,970,000 more than the maximum possible fine for the conduct at issue—is unconstitutionally excessive.

RULE 29.6 STATEMENT

Fortis Insurance Company, n/k/a Time Insurance Company, Inc., is a wholly-owned subsidiary of Interfinancial, Inc., which itself is a wholly-owned subsidiary of Assurant, Inc., a publicly-traded entity. No publicly-traded corporation owns 10% or more of the stock of Assurant, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Fortis Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The decision of the South Carolina Supreme Court (App., *infra*, 1a-28a) has not yet been released for publication. The trial court's order denying the post-trial motions (*id.* at 29a-70a) is unpublished.

JURISDICTION

The South Carolina Supreme Court filed its decision on September 14, 2009 (App., *infra*, 1a), and denied rehearing on December 17, 2009. *Id.* at 71a-72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case arises out of Fortis's erroneous temporary rescission of an individual health insurance policy after receiving a medical record whose date indicated (inaccurately, as it turned out) that the insured, Jerome Mitchell, Jr., had been diagnosed with HIV only two days before he applied for the policy. It was not until after Mitchell filed suit that Fortis learned that the date of the medical record was in error. Fortis then retroactively reinstated the policy and offered to pay all claims that arose during the time that the policy had been rescinded, but Mitchell

continued with his lawsuit. The jury ultimately awarded him $150,000 in compensatory damages and $15 million in punitive damages. The trial court upheld the judgment in full. The South Carolina Supreme Court reduced the punitive damages to $10 million. It reasoned that an exaction of that amount was a constitutionally permissible multiple of the "potential harm" to Mitchell, which it valued at $1,081,189.40—even though Mitchell did not contend at trial that this figure constituted "potential harm," did not ask the jury to base the amount of punitive damages on ***any*** measure of potential harm (instead arguing for a percentage of Fortis's capital surplus), and acquiesced in a jury instruction that specified that the punitive damages must "bear a relationship" to "the harm caused."

The South Carolina Supreme Court's reliance on a consideration that was not urged by the plaintiff and that was not the basis for the jury's verdict adds to confusion in the courts over the procedural safeguards that must be afforded defendants in punitive damages cases. And its application of this Court's three excessiveness guideposts deepens several additional splits. Both the procedural and the substantive aspects of that court's decision warrant review.

A. The Facts Giving Rise To Mitchell's Lawsuit

On May 15, 2001, Mitchell applied for a health insurance policy from Fortis, because he was planning to attend college and his mother's policy no longer covered him. R675, 1891-1896.[1] The policy

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[1] Citations to "R___" refer to the Record on Appeal in the South Carolina Supreme Court.

covered up to 50% of out-of-pocket costs incurred by Mitchell, subject to a $1,000 annual deductible, a separate $500 annual prescription-drug deductible, and various co-payments. R1862, 1872.

Mitchell stated on his application that he had not been "diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession." R1893. Fortis approved the application and issued the policy.

In May 2002, after attempting to donate blood, Mitchell learned that he had tested positive for HIV. R681-682. Mitchell realized that he could not afford the deductibles and co-payments required under the insurance policy he had selected, and his physician advised him to seek free medication from a federally-funded clinic (the "Free Clinic"). R635-636, 686. Mitchell began going to that clinic in July, 2002, and he received free and uninterrupted treatment throughout the period relevant to this lawsuit. R635-636, 700.

In mid-2002, however, Mitchell did submit a small insurance claim relating to his HIV treatment. R1010. In accordance with its standard procedure for addressing claims for long-term disease, Fortis investigated whether Mitchell's illness was an undisclosed pre-existing condition. R1012. The medical records sent to Fortis by Mitchell's physician included a handwritten document, dated May 14, ***2001***, that stated:

> Chief Complaint: Gave blood in March — Got letter yesterday stating blood tested + HIV.

R2396. According to that document, Mitchell had first learned that he was HIV-positive on May 13,

2001—two days before he signed his insurance enrollment form. R1917-1923, 2396-2398.

Based on that record, Fortis concluded that Mitchell had made a material misrepresentation on his application and rescinded the policy. R1925. Fortis notified Mitchell of the rescission by letter dated September 5, 2002, and invited him to submit "any additional information you may have which would effect [*sic*] our decision to rescind your policy." *Ibid.* Although the medical record that Fortis had received from Mitchell's doctor was misdated, Mitchell never told Fortis that.[2]

Not until eight months later, on June 4, 2003, did Mitchell's litigation counsel contact Fortis, alleging bad-faith rescission and breach of contract (R2406-2407) and demanding either $450,000 (plus reinstatement of insurance coverage), or $6 million (without reinstatement). R248, 264-262, 2422-2423. Mitchell's attorneys specified that his demand should not be considered an "appeal" of the rescission, and they also revoked Mitchell's authorization for Fortis to receive his medical records from third parties.

---

[2] The South Carolina Supreme Court stated that Fortis "spurned" the offer of a Free Clinic caseworker to provide documents confirming that Mitchell did not test positive for HIV until after he purchased his policy. App., *infra*, 5a. The "spurn[ing]" in fact consisted of nothing more than accurately informing the caseworker that federal and state law prohibited Fortis from discussing Mitchell's insurance or medical information with third parties without his express written authorization. R644, 708; see 45 C.F.R. §§ 160.101-160.312, 164.102-164.534; S.C. Code § 30-2-20; S.C. Code Regs. 69-58, Art. V § 17(A) (2001). Neither Mitchell nor the caseworker followed up with the necessary authorization, much less proof of the scrivener's error.

R2408, 2412-2414. Finally, although the letter enclosed a copy of the report for a May 14, ***2002*** blood test (*ibid.*), it said nothing to suggest that that was the ***first*** test showing that Mitchell had HIV or to cast doubt on the document bearing the 2001 date.

Despite the insistence by Mitchell's attorneys that he was not appealing the rescission, Fortis's Rescission Committee considered his case again on June 18, 2003. R1950-1960. Still lacking any evidence refuting the conclusion of misrepresentation or casting doubt on the record containing the 2001 date, however, Fortis concluded that it could not reinstate the policy. *Ibid.* It notified Mitchell's lawyers of that decision in writing and invited them to contact it if they had any further questions or concerns. R2020-2030.

Instead, Mitchell filed suit on July 21, 2003. On March 8, 2004, Fortis finally received a corrected medical record in discovery reflecting that the date on the handwritten note was off by a year. R1971-2013. As a result of that new information, Fortis retroactively reinstated Mitchell's health insurance and invited him to submit any claims that accrued while the insurance was temporarily rescinded. R2415-2416. Despite the reinstatement of his insurance, Mitchell continued to receive treatment at the Free Clinic. R635, 660, 686. Mitchell also obtained Blue Cross/Blue Shield health insurance through his employer. R699.

B. Proceedings Below

Mitchell's theory at trial was that Fortis engaged in bad faith by not confirming the accuracy of the medical record on which it based its rescission decision. Mitchell sought compensatory and punitive

damages. In attempting to satisfy South Carolina's standard for punitive damages, Mitchell argued that Fortis had a financial motive for rescinding his policy, namely the money it would save by not having to pay his HIV-related claims.

To support this theory, Mitchell presented testimony from a nurse describing the cost of a generic plan of care for any HIV patient. R771-772. Substantial components of that plan of care addressed health problems that Mitchell himself had never exhibited. R782-783. The nurse's estimate did not account for premiums, co-payments, and deductibles; moreover, some of the largest line items in that estimate were for services that the policy did not even cover, such as psychological treatment. R958 (indicating that "psychological group counseling is the [second] most expensive" component); R1878-1879 (exclusion of mental illness from coverage).

These costs were extrapolated to age 77, the average life expectancy of a male of Mitchell's age. R766. Finally, an economist calculated the present value of the total at $1,081,189.40. R1533.

At trial, Mitchell used this figure for one purpose and one purpose only: to establish bad faith by showing that Fortis had a financial incentive to rescind the policy. He argued during summations that when

> deciding whether Fortis acted willfully in reckless disregard, one of the things that you can also consider, besides all those reasons, is whether Fortis had a ***financial incentive*** to act the way they did.
>
> ... If Fortis's health care management team had done numbers, the minimum care costs they were looking at would have been

> in this range. That's their ***financial incentive.***
>
> ... [Adding in other costs, g]ives you a total of one million eighty-one thousand and one hundred and eighty-nine dollars and forty ***($1,081,189.40)*** cents, the treatment and costs that were facing Fortis Insurance Company at the time that they decided to rescind Jerome's policy.

R1532-1533 (emphasis added). Consistent with that argument, the trial court instructed the jury that it could consider any financial incentive "in determining whether an insurance company acted in bad faith and with willful or reckless disregard for the Plaintiff's rights." R1601.

Mitchell took a totally different tack in arguing about the ***amount*** of punitive damages, urging the jury to award a percentage of either Fortis's investment income or its capital surplus. R1536-1537.

Mitchell never suggested to the jury that it should consider "potential harm" in setting the amount of punitive damages, much less that the $1,081,189.40 figure was an accurate measure of potential harm. Nor did he ask the trial court to instruct the jury that it could consider potential harm. Instead, he acquiesced in an instruction that focused the jury squarely on the actual harm caused by the conduct. That instruction told the jury that, in setting punitive damages,

> You must first consider the relationship between any punitive damage and ***the harm caused***. Any penalty imposed should take into account the reprehensibility of the conduct, ***the harm caused,*** the Defendant's

> awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment; thus, any penalty imposed should bear a relationship to the nature and extent of the conduct and ***the harm caused,*** including the compensatory damage award made by you.

R1606-1607 (emphasis added).

The jury awarded $150,000 in compensatory damages and $15 million in punitive damages on the bad-faith claim, as well as $36,600 for breach of contract. R1632-1633. Because the contract and tort claims were alternative theories of liability, Mitchell elected the tort damages, and the trial court entered judgment for $150,000 in compensatory damages and $15 million in punitive damages. See App., *infra*, 2a.

Fortis filed post-trial motions, arguing, among other things, that the punitive award was unconstitutionally excessive. The trial court upheld the judgment in its entirety, concluding, *inter alia*, that the punitive damages were not disproportionate to the $6 million lifetime maximum payout under the policy, which it regarded to be a reasonable measure of the "potential harm" from the rescission. App., *infra*, 48a-49a. On appeal, the South Carolina Supreme Court reduced the punitive award to $10 million on the ground that it was unconstitutionally excessive under the three guideposts identified in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and refined in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). See App., *infra*, 24a.

Analyzing the five reprehensibility factors identified in *State Farm*, the court first determined that "Fortis's conduct was highly reprehensible and that

the imposition of punitive damages was appropriate." App., *infra*, 20a.

Turning to the ratio guidepost, the court held that the punitive damages should not be compared to the $150,000 award of actual damages, but instead "to the *potential* harm suffered by the plaintiff." App., *infra*, 20a. It nevertheless rejected "the circuit court's assertion that Mitchell suffered $6 million in potential harm" as "unsupported by the evidence and too speculative." *Id.* at 21a. Instead, the court decided that the $1,081,189.40 present value of the nurse-expert's hypothetical treatment plan—which had never before been offered for this purpose—"bears a closer relation to Mitchell's potential risk than the $6 million lifetime payout." *Ibid.* The court then held that the 13.9:1 ratio of the punitive damages to this newly identified measure of potential harm was grossly excessive. *Ibid.*

The court next considered the third guidepost, but did not address the legislatively established civil penalties for insurance bad faith, which it had held in an earlier case to be too small to compare with any "'meaningful punitive damage award.'" See *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006). Instead, it reviewed the punitive-to-compensatory ratios in other cases without regard to the nature of the conduct in those cases or the absolute amount of punitive damages at issue. Noting that "South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from the norm in cases involving particularly egregious conduct," the court concluded that "the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio." App., *infra*, 23a-24a.

It accordingly reduced the punitive award to $10 million, 9.2 times the measure of potential harm it had latched onto.

REASONS FOR GRANTING THE PETITION

The question whether and how the due process clause constrains common-law punitive damages awards is both a recurring and an important one. This Court's recent decisions in this area have helped bring greater procedural fairness and have reduced the frequency of arbitrary, outlier exactions. Nevertheless, there remains a good deal of confusion in the lower courts regarding the proper application of those precedents and, as a result, many outsized exactions continue to escape the net. The present case exemplifies this confusion in several different respects, making it an excellent vehicle for providing the guidance that the lower courts continue to need.

First, in justifying the enormous and disproportionate exaction in this case, the South Carolina Supreme Court relied on a post hoc "potential harm" theory that Fortis had no realistic opportunity to refute at trial and that demonstrably was not the basis for the verdict. The court thereby deprived Fortis of a core element of procedural due process and placed itself in conflict with decisions of other courts that have refused to countenance after-the-fact justifications for punitive damages judgments. Second, the decision below deepens divisions among the lower courts regarding the proper application of each of the three *BMW* guideposts by (i) confining the reprehensibility inquiry to a rote, checklist-like approach to the five reprehensibility factors identified in *State Farm* and failing to compare the conduct in this case to other conduct for which comparable amounts of punitive damages have been permitted; (ii) ignoring

this Court's admonition that, when the compensatory damages are "substantial," a 1:1 ratio may mark "the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 410, 425); and (iii) refusing to compare the punitive damages to the legislatively established fine for comparable conduct on the ground that the fine is "too low." In short, this case presents the Court with an opportunity to clarify multiple aspects of its punitive-damages jurisprudence in a single stroke.

I. The South Carolina Supreme Court's Employment Of A Post Hoc Rationale For The Punitive Award Warrants Review And Reversal.

This Court has indicated that perhaps the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to ***the actual harm*** inflicted on the plaintiff." *BMW*, 517 U.S. at 580 (emphasis added); see also *State Farm*, 538 U.S. at 426 ("courts must ensure that the measure of punishment is both reasonable and proportionate to ***the amount of harm to the plaintiff*** and to ***the general damages recovered***") (emphasis added); *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2629 (2008) ("the ratio between compensatory and punitive damages is ... a central feature in our due process analysis"). Indeed, in setting the common-law limit on punitive damages in maritime cases, the Court placed near-exclusive emphasis on the ratio of punitive to compensatory damages. See *Exxon Shipping, supra*. In addition to being a practice of long standing, comparing punitive damages to compensatory damages has the virtue of simplicity because both figures are almost always readily discernible from the verdict form.

Nevertheless, in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), a three-Justice plurality opined that in some cases "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded." *Id.* at 460. The plurality proceeded to conclude that the $10 million punitive award in that case was not sufficiently disproportionate to the potential harm (which the plurality indicated could have ranged from $1 million to $8.3 million) to be indicative of unconstitutionality. *Id.* at 462.

Significantly, four of the remaining six Justices rejected the plurality's reliance on potential harm in that case because that theory had not been argued at trial. In a dissenting opinion joined by two other Members of the Court, Justice O'Connor explained that she had no quarrel with the plurality that, "in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim," but observed that in the case before the Court "[t]he record demonstrates that the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal." *Id.* at 484-485 (O'Connor, J., dissenting). Specifically, the potential harm figures were based on post hoc extrapolations from evidence offered for other purposes; the jury was never instructed that it could consider potential harm; and respondent never suggested to the jury that it set punitive damages based on potential harm, focusing instead "on TXO's vast wealth." *Id.* at 485-487 (O'Connor, J., dissenting). In his concurring opinion, Justice Kennedy agreed that "the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct" and that the po-

tential harm theory therefore did not "provide[] a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational." *Id.* at 468 (Kennedy, J., concurring).[3]

Since *TXO*, the lower courts have been deeply confused about when potential harm may be used to justify an otherwise disproportionate punitive award. Agreeing with Justices O'Connor and Kennedy, some courts have refused to consider potential harm in the analysis because that rationale was not placed before the jury.[4] By contrast, like the *TXO* plurality, other courts have invoked potential harm even when the plaintiff did not invoke that rationale at trial and the jury was not instructed to consider it.[5]

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[3] Justices Scalia and Thomas had no reason to involve themselves in this dispute because they concurred in the judgment on the ground that the Due Process Clause places no limits on the amount of punitive damages. *TXO*, 509 U.S. at 470-472 (Scalia, J., dissenting).

[4] See, *e.g.*, *Sec. Title Agency, Inc.* v. *Pope*, 200 P.3d 977, 1000 (Ariz. Ct. App. 2008) (rejecting plaintiff's contention that five-year lost-profits projection introduced to support claim for compensatory damages and evidently rejected by the jury could be used, after-the-fact, as a measure of the potential harm from the misconduct); *Goddard* v. *Farmers Ins. Co.*, 179 P.3d 645, 666 (Or. 2008) (en banc) (refusing to credit argument in insurance bad-faith case that potential harm to the insured included an amount that could have been, but was not awarded, against the insured in the underlying personal injury case because "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury" in the case in which punitive damages are awarded).

[5] See, *e.g.*, *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1350 (Fed. Cir. 2001) (noting that "competent evidence of damages may have existed, but was never introduced" and reinstating punitive award that was 38,000 times the compensatory damages based

This case is an ideal vehicle for resolving the confusion in the lower courts because there can be no serious question that the South Carolina Supreme Court's reliance on the ratio between the punitive damages and the $1,081,189.40 figure was a post hoc rationale of which Fortis lacked any meaningful notice. Specifically, (i) Mitchell at no point so much as hinted that the $1,081,189.40 figure was relevant to anything other than Fortis's motive; (ii) Mitchell did not seek an instruction informing the jury that it could consider potential harm (however measured) in setting the amount of punitive damages; (iii) the trial court never instructed the jury that it could consider potential harm in setting the punitive damages and instead told the jury that the punitive damages had to "bear a relationship to ... the harm caused, including the compensatory damage award made by you" (R1606-1607); (iv) Mitchell urged the jury to base the punitive damages on a percentage of Fortis's wealth; and (v) the verdict was 5% of Fortis's surplus—one of the very measures suggested by Mitchell—rounded

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on "a strong suggestion in the record that the potential compensatory damages may have been much higher than what was actually awarded"); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 384 (La. Ct. App. 2001) (construing *TXO* to permit post hoc reliance on potential harm "*despite the fact that there was no jury determination of the amount of such potential harm*"); *Bennett* v. *Reynolds*, 242 S.W.3d 866, 905 & n.46 (Tex. Ct. App. 2007, pet. granted) (acknowledging that jury never found potential harm, but nonetheless justifying punitive awards that were 188 and 47 times the compensatory damages on the ground that plaintiff could have suffered emotional distress and reputational harm, which the court valued at $500,000 based on one defendant's testimony that *he* would accept $500,000 for *his* emotional distress).

to the nearest million dollars.[6] Accordingly, this case well frames the question whether upholding a punitive award in reliance on a theory of "potential harm" that was not presented to the jury and was not the basis for its verdict violates procedural due process.

There also should be little doubt that the answer to that question is "yes." The avoidance of surprise has long been recognized as an important component of due process. See, *e.g.*, *Burns* v. *United States*, 501 U.S. 129, 138 (1991) (noting "serious question whether notice in this setting [upward departures from Sentencing Guidelines] is mandated by the Due Process Clause"). Mere notice of the proceedings is insufficient. "In a variety of contexts, [this Court's] cases have repeatedly emphasized the importance of giving the parties sufficient notice ***to enable them to identify the issues on which a decision may turn.***" *Lankford* v. *Idaho*, 500 U.S. 110, 126 n.22 (1991) (emphasis added); see also *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."); *NLRB.* v. *Air Assocs., Inc.*, 121 F.2d 586, 591 (2d Cir. 1941) ("the test of a fair hearing is whether the issues were clearly defined, so that respondent could address itself to the charges made against it"). Indeed, the right to present "every available defense" (*Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted)) is mea-

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[6] It also was precisely 100 times the tort damages—again, a measure wholly unrelated to the $1,081,189.40 figure.

ningless without fair notice of the theory on which an award of punitive damages is to be justified.

The present case is remarkably similar to *Lankford*, in which this Court held that a trial court violated a defendant's right to due process by imposing the death sentence without giving the defendant any inkling that such a sentence was under consideration.[7] In *Lankford*, the defendant was convicted of first-degree murder. After the guilt phase, the trial court instructed the prosecution to notify the court and the defendant whether it intended to seek the death penalty and, if so, to identify the aggravating circumstances on which it intended to rely. The prosecution responded that it did not intend to seek the death penalty. Thereafter, the penalty hearing took place without any mention of the death penalty by either the prosecution or the court. The court nevertheless sentenced the defendant to death.

This Court reversed, explaining that "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford*, 500 U.S. at 126. The Court rejected the State's argument that "the terms of the statute, plus the advice received at [the defendant's] arraignment, provided such notice" (*id.* at 119), noting that, in view of the prosecution's statement that it was not seeking the death penalty, "it was surely reasonable for the defense to assume that there was no reason to present argument or evidence directed at the question whether the death penalty was either appropri-

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[7] Although *Lankford* was a criminal case, this Court relied on it in *BMW*, noting that "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*." 517 U.S. at 574 n.22 (citation omitted).

ate or permissible." *Id.* at 120. Accordingly, the defendant's "lack of adequate notice that the judge was contemplating the imposition of the death penalty created an impermissible risk that the adversary process may have malfunctioned." *Id.* at 127.

In the present case, the trial court's instructions, which focused exclusively on actual injury, combined with Mitchell's exclusive reliance on wealth-based measures of punishment in his closing arguments, were the functional equivalent of the prosecution's statement in *Lankford* that it did not intend to seek the death penalty. Just as the defendant in *Lankford* had "no reason to present argument or evidence directed at the question whether the death penalty was either appropriate or permissible" (*id.* at 120; see also *id.* at 122), so too Fortis had "no reason" to devote scarce trial time (and juror patience) to show why the $1,081,189.40 figure was a wholly invalid measure of potential harm.[8] Accordingly, just as in *Lankford*, "lack of notice" that the South Carolina Supreme Court would invoke the $1,081,189.40 figure post hoc to justify the punitive award "created an impermissible risk that the adversary process may have malfunctioned." *Id.* at 127; see also *In re Ruffalo*, 390 U.S. 544, 551-552 (1968) ("[Proceedings] become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. ... This absence of fair notice as to the reach of the grievance procedure and the precise na-

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[8] Among other things, the nurse's estimate (i) was based on the unrealistic assumption that Mitchell would live to age 77, (ii) included expensive services (like psychological counseling) that were not covered by Mitchell's policy (see p. 6, *supra*), and (iii) failed to back out the deductibles, co-pays, and premiums that Mitchell is obligated to pay.

ture of the charges deprived petitioner of procedural due process.").

The efforts this Court has made to ensure that punitive damages are adequately constrained will be thwarted if resistant reviewing courts are afforded *carte blanche* to uphold large exactions on the basis of factors never considered, much less relied on, by the jury—especially such malleable ones as "potential harm." To prevent this practice from adding "a near standardless dimension to the punitive damages equation" (*Philip Morris*, 549 U.S. at 347), the Court should grant certiorari and roundly condemn the use of post hoc rationalizations to justify large punitive damages awards.

II. The South Carolina Supreme Court's Application Of The *BMW* Guideposts Warrants Review And Reversal.

Quite apart from the South Carolina Supreme Court's troubling treatment of potential harm, that court's application of the three *BMW* guideposts is illustrative of the conceptual confusion that continues to plague the lower courts, making this case an ideal vehicle for this Court to provide the clarification and guidance that the lower courts sorely need.

Over the past two decades, this Court repeatedly has expressed concern about awards of punitive damages that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris*, 549 U.S. at 355. To assist courts in determining when a punitive award is unconstitutionally excessive, the Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio between the punitive and compensatory damages (or, in appropriate circumstances, potential

harm); and (iii) the difference between the punitive damages and the legislatively-established penalties for comparable misconduct. *BMW*, 517 U.S. at 574-585.

Regrettably, lower courts often apply the *BMW* guideposts mechanically without considering this Court's broader concerns about the "extraordinary" size of punitive awards "by historical standards" (*BMW*, 517 U.S. at 594 (Breyer, J., concurring)) and their "stark unpredictability" (*Exxon Shipping*, 128 S. Ct. at 2625). Moreover, courts routinely misapply the guideposts, weakening their "constraining power to protect against serious and capricious deprivations [of property]." *BMW*, 517 U.S. at 590 (Breyer, J., concurring).

This case is emblematic. The South Carolina Supreme Court applied the three guideposts in robotic fashion, demonstrating no sensitivity to their intended purpose, much less the ultimate inquiry of whether a $10 million exaction is "greater than reasonably necessary to punish and deter" the conduct at issue. *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). Along the way, it made fundamental errors with regard to each guidepost. For example, with respect to the reprehensibility guidepost, it treated the five factors identified in *State Farm* as exclusive, binary considerations and, after concluding (erroneously) that most were present, labeled the conduct "highly reprehensible," and moved on to the next guidepost. Critically absent was any acknowledgment that ***all*** punishable conduct is reprehensible to some degree or any effort to place Fortis's conduct on a spectrum of reprehensibility by comparing it to other kinds of conduct that have warranted penalties in the $10 million range. With regard to the

ratio guidepost, the South Carolina Supreme Court misread this Court's cases by ignoring the Court's admonition that a 1:1 ratio of punitive damages to actual or potential harm may be the constitutional maximum when compensatory damages are "substantial," and instead assuming that any ratio below 10:1 will generally satisfy this guidepost. Finally, the South Carolina Supreme Court effectively nullified the third guidepost by refusing to compare the punitive damages to the legislatively established fine for insurance bad faith and instead simply canvassing the ratios of punitive to compensatory damages in prior South Carolina cases.

Each of the South Carolina Supreme Court's conceptual errors is illustrative of a more pervasive confusion. Indeed, the lower courts are deeply divided as to all three points, reflecting the "arbitrariness" (*Philip Morris*, 549 U.S. at 355), "stark unpredictability" (*Exxon Shipping*, 128 S. Ct. at 2625), and "unfairness" (*id.* at 2627) about which this Court has expressed concern. This Court's review is urgently needed to bring the necessary fairness and predictability to the process.

A. Reprehensibility

The purpose of the reprehensibility guidepost is to ensure that the amount of punitive damages is not out of proportion to "'the enormity of [the] offense'" (*BMW*, 517 U.S. at 575)—or, as Justice Breyer has put it, to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*id.* at 590 (Breyer, J., concurring)). To assist courts in making this determination, this Court has identified five, nonexclusive factors: (i) whether the harm was physical or merely economic; (ii) whether the conduct involved

a reckless disregard for health or safety; (iii) whether the target of the conduct was economically vulnerable; (iv) whether the defendant's conduct was part of a broader pattern or instead was an isolated incident; and (v) whether the conduct entailed "intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. That effort at providing guidance has, however, caused many courts to lose sight of the forest for the trees. Rather, than using these factors as a means of locating the conduct on a spectrum of reprehensibility and assessing whether the conduct was bad enough to justify the amount of punishment imposed, courts have treated them as a checklist and assumed that the more boxes that can be checked, the higher the permissible ratio of punitive to compensatory damages.[9]

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[9] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-840 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-1371 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Fastenal Co.* v. *Crawford*, 609 F. Supp. 2d 650, 669 (E.D. Ky. 2009); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-970 (N.D. Iowa 2006); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at *29-*31 (W.D. Pa. Jan. 3, 2006); *Sanchez* v. *Brokop*, 398 F. Supp. 2d 1177, 1194 (D.N.M. 2005); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-361 (Ark. 2003); *Superior Fed. Bank.* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006); *Century Sur. Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-499 (Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d at 742, 747-748 (Ga. Ct. App. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-447 (Kan. 2006); *Vasquez-Lopez* v. *Beneficial*

Relatedly, in their rigid adherence to the five factors, many courts have either expressly or implicitly rejected the notion that a meaningful assessment of reprehensibility entails comparing the conduct at issue to that in other cases in which significant amounts of punitive damages have been imposed.[10] By contrast, a number of courts have rejected this blinkered approach, recognizing that the goal of avoiding arbitrariness requires ensuring that conduct of similar reprehensibility draws similar punishment, while conduct of differing reprehensibility is punished differently.[11]

Or., Inc., 152 P.3d 940, 959 (Or. Ct. App. 2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-604 (Tex. Ct. App. 2005); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App. 2005), rev'd on other grounds sub nom. *Coastal Oil & Gas Corp* v. *Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-419 (Tex. Ct. App. 2003), rev'd per curium on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-417 (Utah 2004).

[10] See, *e.g.*, *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1320 (11th Cir. 2007); *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007).

[11] See, *e.g.*, *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 54, 55-56 (1st Cir. 2009) ("Although the Mayor's conduct was reprehensible, it was not 'particularly egregious' in comparison to defendants' conduct in other cases supporting substantial punitive awards."); *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 875 (8th Cir. 2008) ("the reprehensibility of its conduct was comparable to the conduct which supported punitive damages in prior business cases"); *Saunders* v. *Branch Banking & Trust Co.*, 526 F.3d 142, 154 (4th Cir. 2008) ("Examining [other] punitive damages awards for violations of FCRA, we cannot conclude that an award of $80,000 is grossly excessive or arbitrary."); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005) (misconduct in connection with the performance of "a socially valuable task" is less reprehensi-

The decision below is illustrative of this conceptual confusion. The South Carolina Supreme Court marched through the five *State Farm* factors, concluded that four were present (and that the absence of the fifth didn't matter), and then jumped to the conclusion that "Fortis's conduct was highly reprehensible." App., *infra*, 20a.[12] Even if, in hindsight,

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ble than conduct serving no legitimate purpose, such as "intentional, repeated ethnic harassment"); *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming $1.25 million punitive award for breach of fiduciary duty because the misconduct, "according to the hierarchy of reprehensiveness, was clearly more reprehensible than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*"); *Roby* v. *McKesson Corp.*, 219 P.3d 749, 797 (Cal. 2009) ("McKesson's conduct, although wrongful, does not rise to the kind of oppressive, fraudulent, or malicious conduct that has in the past justified large punitive damages awards."); *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (reducing punitive award from $1.7 million to $50,000 in part because the fraud at issue was "of relatively low culpability" compared to "the universe of cases warranting punitive damages under California law"); *McDonald's Corp.* v. *Ogborn*, 2009 WL 3877533, at *21 (Ky. Ct. App. Nov. 20, 2009) ("The $1,000,000 punitive damages award is extraordinary when compared to other stand-alone IIED cases."); *Dardinger* v. *Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 140, 143 (Ohio 2002) (comparing reprehensibility and dollar awards from other cases).

[12] In holding that the repeated misconduct factor was present merely because Fortis initially upheld its rescission decision during an internal review, the South Carolina Supreme Court contributed to a deep split over the meaning of this factor. See *Sec. Title Agency*, 200 P.3d at 1000 n.23 ("We also note that jurisdictions differ as to whether 'repeated actions' for this purpose may consist solely of acts against the plaintiff or whether the plaintiff must show that the defendant has committed outrageous acts against another."). Like the South Carolina Supreme Court, some lower courts have declared this factor to be present after atomizing the conduct that injured the plaintiff.

Fortis's reliance on the misdated medical record, like the conduct of State Farm toward the Campbells, "merits no praise" (*State Farm*, 538 U.S. at 419), the South Carolina Supreme Court never asked the key question whether that conduct warrants a $10 million penalty and seemed entirely untroubled by the

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See, *e.g.*, *CGB Occupational Therapy, Inc.* v. *RHA Health Servs., Inc.*, 499 F.3d 184, 191 (3d Cir. 2007) ("while the 'repeated conduct' subfactor will necessarily have 'less force' where the defendant's misconduct did not extend beyond his dealings with the plaintiff, it may still be 'relevant' in measuring the reprehensibility of the defendant's conduct") (quoting *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 232-233) (3d Cir. 2005); *Trinity Evangelical Lutheran Church & Sch.-Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 801 (Wis. 2003) ("Gallagher, as the representative of Tower, made a series of decisions that illustrate bad faith on behalf of Tower."). By contrast, numerous other courts have held that "[t]he repeated conduct factor 'require[s] that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff.'" *Chicago Title Ins. Corp.* v. *Magnuson*, 487 F.3d 985, 1000 (6th Cir. 2007) (quoting *Bach* v. *First Union Nat'l Bank*, 149 F. App'x 354, 365 (6th Cir. 2005)). See *Fastenal Co.* v. *Crawford*, 609 F. Supp. 2d 650, 670 (E.D. Ky. 2009) ("this behavior by the ... Defendants does not constitute similar reprehensible conduct committed against different parties and thus this factor does not weigh in favor of a punitive damage award"); *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Ct. App. 2007) (finding that insurer's "persistent denial of a defense" failed to satisfy the "repeated actions" prong because "[t]here was one denial of the tender of a defense" and "'persistent' is not the same as a repetition of the decision in other instances"); *Simon*, 113 P.3d at 76 (factor requires that defendant "had acted similarly toward other potential buyers"); *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13 (Guam Nov. 16, 2004) (this factor was not implicated even though defendant's wrongful acts "spanned several years" and injured plaintiff on separate occasions because those acts comprised a single course of conduct).

fact that the highest amount of punitive damages ever before sustained in an insurance bad-faith case in South Carolina was only $1.5 million (*Cock-N-Bull Steak House, Inc.* v. *Generali Ins. Co.*, 466 S.E.2d 727, 729 (S.C. 1996)), and that a $10 million exaction dwarfs the punishments authorized in other cases in which the conduct was materially more reprehensible.[13] That cavalier approach to the reprehensibility guidepost cannot be reconciled with this Court's concerns about "the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another" (*Exxon Shipping*, 128 S. Ct. at 2627) and, more particularly, about "the uniform general treatment of similarly si-

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[13] See, *e.g.*, *Planned Parenthood of Columbia/Willamette Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005) (reducing punitive awards totaling $109 million to just over $4.7 million in case in which anti-abortion activists put up "WANTED" posters threatening doctors who provided abortions, creating a threat so serious that that the FBI "warned [the] physicians to purchase bullet proof vests"); *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-603 (8th Cir. 2005) (reducing $15 million punitive award to $5 million where defendant "actively misled consumers about the health risks associated with smoking" leading the decedent's "painful, lingering death following extensive surgery"); *Kemp* v. *AT&T Co.*, 393 F.3d 1354, 1363, 1365 (11th Cir. 2004) (reducing $1 million punitive award to $250,000 where defendant was found to have participated in a "large-scale corporate" effort "to exploit customers who were un-sophisticated and economically vulnerable" by misleadingly presenting gambling debts as "legitimate" long-distance phone charges); *Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 526-529 (Ala. 1997) (reducing punitive damages from $15 million to $3 million where defendant engaged in pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

tuated persons that is the essence of law itself" (*Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (internal quotation marks omitted)).

B. Ratio

In *State Farm*, this Court explained that "[w]hen compensatory damages are substantial, then a lesser ratio, ***perhaps only equal to compensatory damages***, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added); see also *Exxon Shipping*, 128 S. Ct. at 2626, 2634. Heeding this guidance, many courts have reduced punitive awards to amounts at or near compensatory damages when the latter were "substantial."[14] However, many other courts flatly ignore

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[14] See, *e.g.*, *Noyes* v. *Kelly Servs., Inc.*, 2009 WL 3358564, at *1 (9th Cir. Oct. 20, 2009); *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 442-443 (6th Cir. 2009); *Mendez-Matos*, 557 F.3d at 55; *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 27-28 (3d Cir. 2008); *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 490 (6th Cir. 2007); *Bach*, 486 F.3d at 156; *Boerner*, 394 F.3d at 603; *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004); *Cummings Inc.* v. *BP Prods. N. Am., Inc.*, 648 F. Supp. 2d 969, 987 (M.D. Tenn. 2009); *Farm Bureau Life Ins. Co.* v. *Am. Nat'l Ins. Co.*, 2009 WL 361267, at *9-*11 (D. Utah Feb. 11, 2009); *Paul* v. *Asbury Auto. Group, LLC*, 2009 WL 188592, at *11 (D. Or. Jan. 23, 2009); *Martinez* v. *Thompson*, 2008 WL 5157395, at *10 (N.D.N.Y. Dec. 8, 2008); *Adidas Am., Inc.* v. *Payless Shoesource, Inc.*, 2008 WL 4279812, at *15-*16 (D. Or. Sept. 12, 2008); *Zakre* v. *Norddeutsche Landesbank Gironzentrale*, 541 F. Supp. 2d 555, 563-567 (S.D.N.Y. 2008); *Thomas* v. *iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007); *Slip-N-Slide Records, Inc.* v. *TVT Records, LLC*, 2007 WL 3232274, at *30 (S.D. Fla. Oct. 31, 2007); *Kent* v. *United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 957-960 (D.S.D. 2006), aff'd in part, rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007); *Casumpang* v. *Int'l Longshore &*

State Farm's warning that a 1:1 ratio will often be the constitutional maximum and instead assume that any single-digit ratio is presumptively valid.[15]

The current case deepens this conflict. The court below effectively ignored the guidance provided by

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Warehouse Union, 411 F. Supp. 2d 1201, 1219-21 (D. Hawaii 2005); *Watson* v. *E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005), aff'd, 225 F. App'x 3 (2d Cir. 2006); *Hudgins* v. *Sw. Airlines Co.*, 212 P.3d 810, 829-830 (Ariz. Ct. App. 2009); *Sec. Title Agency*, 200 P.3d at 1001; *Roby*, 219 P.3d at 798-799; *Walker*, 63 Cal. Rptr. 3d at 512-514; *Stevens* v. *Vons Cos.*, 2009 WL 117902, at *14 (Cal. Ct. App. Jan. 20, 2009), cert. denied, 130 S. Ct. 204 (2009); *Jet Source Charter, Inc.* v. *Doherty*, 55 Cal. Rptr. 3d 176, 181-184 (Ct. App. 2007); *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004); *Maskantz* v. *Hayes*, 832 N.Y.S.2d 566, 570 (App. Div. 2007); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003).

[15] See, *e.g.*, *Myers* v. *Central Fla. Invs., Inc.*, 2010 WL 20987, at *17 (11th Cir. Jan. 6, 2010); *Wallace* v. *DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009); *Craig Outdoor Adver., Inc.* v. *Viacom Outdoor, Inc.*, 528 F.3d 1001, 1020-1021 & n.9 (8th Cir. 2008), cert. denied, 129 S. Ct. 1000 (2009); *Action Marine*, 481 F.3d at 1321; *Cambio Health Solutions, LLC* v. *Reardon*, 234 F. App'x 331, 339 (6th Cir. 2007); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. 2004); *Rhone-Poulenc Agro*, 345 F.3d at 1372; *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003); *Bogle*, 332 F.3d at 1362; *Union Pac. R.R.*, 149 S.W.3d at 348; *Advocat Inc.*, 111 S.W.3d at 361; *Leeper-Johnson* v. *Prudential Ins. Co. of Am.*, 2009 WL 1318692, at *22-*23 (Cal. Ct. App. May 13, 2009); *Lopez* v. *Bimbo Bakeries USA, Inc.*, 2009 WL 1090375, at *17 (Cal. Ct. App. Apr. 23, 2009); *Century Sur. Co.*, 43 Cal. Rptr. 3d at 500; *McDonald's*, 2009 WL 3877533, at *20-*21; *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007); *Wieber* v. *FedEx Ground Package Sys., Inc.*, 220 P.3d 68, 86 (Or. Ct. App. 2009); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App. 2003), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418.

this Court in *State Farm* (and reinforced in *Exxon Shipping*), concluding that the full range of single-digit ratios is available in virtually all cases, notwithstanding its determination that the compensatory damages were "fairly substantial." App., *infra*, 22a. This case is thus a good one in which to lay down further guidance on this important safeguard against arbitrary punishments.

C. Legislatively established penalties for comparable conduct

The third *BMW* guidepost requires reviewing courts to "[c]ompare[] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. The lower courts are all over the map in applying this guidepost. *See Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) ("the Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in doing so").[16]

Most importantly for present purposes, there is a clear split as to whether the third guidepost is relevant when the legislatively established fines for the pertinent conduct are low. Notwithstanding this Court's invocation of low fines when applying the

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[16] See also *Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521, 540 (Tenn. 2008) ("We are unfortunately left with little guidance as to how to resolve this discrepancy because both *Gore* and *[State Farm]* are cases in which all of the guideposts suggest the same result. Other courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether."), cert. denied, 129 S. Ct. 2433 (2009).

third guidepost in *BMW* and *State Farm* (see *BMW*, 517 U.S. at 584 ($2,000); *State Farm*, 538 U.S. at 428 ($10,000)), a surprising number of courts have refused to treat the existence of a low fine as an indication that a high punitive award is excessive.[17] These

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[17] See, *e.g.*, *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-1233 (10th Cir. 2000) (affirming $58.5 million punitive award that exceeded maximum possible civil penalty by $56 million and explaining that statutory *maximum* punitive damages ratio of 1:1 gave defendant adequate notice of extent to which it could be punished), aff'd, 532 U.S. 588 (2001); *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (affirming $4.35 million award because potential for $10,000 fine "provided fair notice to CE that it might be subject to a substantial penalty"); *Willow Inn*, 399 F.3d at 237-238 (disregarding disparity between $135,000 punitive award and maximum comparable penalty of $10,000 because the court was "reluctant to overturn the punitive damages award on this basis [of the third guidepost]"); *Kemp*, 393 F.3d at 1364 (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *BMW of N. Am., Inc.* v. *Gore*, 701 So. 2d 507, 514 (Ala. 1997) (per curiam) ("Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award"); *Aken* v. *Plains Elec. Generation & Transmission Co-op.*, 49 P.3d 662, 672 (N.M. 2002) ("As the Supreme Court of Alabama noted in *BMW* on remand, when statutory penalties for the conduct in question are low or do not exist, 'a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.'") (quoting *BMW*, 701 So. 2d at 514); *Flax*, 272 S.W.3d at 540 (approving $13.3 million award because "we do not believe that a punitive damage award [equal to maximum civil penalty] of $125,000 would adequately punish DCC or deter future instances of similar conduct"); *Campbell*, 98 P.3d at 419 (holding on remand that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a

courts are in square conflict with several others that have faithfully applied the third guidepost and concluded that the modest size of legislatively established penalties dictates a finding of excessiveness.[18]

The decision below adds to this split. Section 38-2-10 of the South Carolina Code sets maximum penalties for bad-faith insurance conduct of either $15,000 or, if the conduct was willful, $30,000. But because it had already held in an earlier case that, when penalties for comparable conduct "are set at

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legislature can be quixotic"); see also *In re Exxon Valdez*, 490 F.3d 1066, 1094 (9th Cir. 2007) ("In several recent decisions we have not discussed the factor at all. This may be because legislative judgments, unlike jury verdicts, do not represent an individualized assessment of reprehensibility.") (citations omitted), vacated on other grounds, 128 S. Ct. 2605 (2008).

[18] See, *e.g.*, *Jurinko*, 305 F. App'x at 29-30 ("[T]he large punitive damages award appears excessive in light of the comparatively modest monetary sanctions imposed for such conduct. Section 1171 is unlikely to provide an insurer with fair notice of a $6.25 million award. Although the outrageous conduct that occurred here is unlikely to be deterred by the statutory penalties in § 1171, the third guidepost suggests the award was excessive."); *Bridgeport Music*, 507 F.3d at 490 (third guidepost indicated excessiveness because punitive award was much larger than "the *maximum* allowable" amount of statutory damages under the Copyright Act, which "would be the largest award that a victim of copyright infringement could receive irrespective of the reprehensibility of an infringer's conduct"); *Chasan* v. *Farmers Group, Inc.*, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009) (comparing $370,000 punitive award in insurance bad-faith action to range of fines permissible for unfair insurance claims practices ($5,000 to $50,000), and reducing punitive award to $40,000); *Roby*, 219 P.3d at 798 ($150,000 civil penalty "[o]bviously ... weighs in favor of a lower constitutional limit in this case"); *Major* v. *W. Home Ins. Co.*, 87 Cal. Rptr. 3d 556, 580 (Ct. App. 2009) (concluding that $10,000 civil penalty "supports a relatively low punitive damages award").

such a low level, there is little basis for comparing it with any meaningful punitive damage award" (*James*, 638 S.E.2d at 672 (internal quotation marks omitted)), the South Carolina Supreme Court disregarded those penalties entirely. Instead, it looked to the ratios of punitive to compensatory damages in prior South Carolina cases, thereby effectively duplicating the second-guidepost analysis, and rendering the third guidepost a nullity. App., *infra*, 22a-24a.

In short, in no small part because courts have misunderstood and misapplied the three *BMW* guideposts, "the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 532 U.S. at 436 (internal quotation marks omitted)) remains to be achieved. Because this case is an excellent vehicle for providing the lower courts with the guidance they need, and because there can be little doubt that the court below made critical errors with respect to each of the guideposts, the Court should grant certiorari and reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2010